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FAX COVER SHEET

DATE: December 19, 2008

TO: Allen Merritt **FAX:** (208) 736-3037

FROM: Dana Hofstetter

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DEPARTMENT OF
WATER RESOURCES

Dana L. Hofstetter, ISB #3867
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Attorney for Protestant Indian Creek Ranch Owners, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

In the Matter of Application for Permit No. 37-22252 and Transfer No. 74449 In the Name of Dry Lot LLC	))))))	**MOTION TO VACATE HEARING AND PRE-HEARING SCHEDULE**

Protestant Indian Creek Ranch Owners Association, Inc.("ICROA"), by and through its counsel of record, Dana L. Hofstetter of Hofstetter Law Office, LLC, and pursuant to the Idaho Department of Water Resources' Rules of Procedure and other applicable legal authorities, hereby moves for vacation of the hearing and pre-hearing schedule in this matter. This Motion is supported by Idaho Department of Water Resources ("IDWR") files for the above-referenced matter, other matters of record with IDWR, and the *Affidavit of Dana L. Hofstetter* filed contemporaneously herewith.

Background

In Application for Permit No. 37-22252, Dry Lot LLC requests a ground water right for 0.79 cubic feet per second ("cfs') to irrigate 39.6 new acres that represent the total lot acreage in excess of the ½ acre per lot irrigation limitation under the Valley Club's existing ground water rights.[1] The associated Transfer Application No. 74449 proposes the use of portions of three Big Wood River irrigation rights for recharge mitigation of Permit No. 37-22252. The subject water rights (37-21130, 37-21137, and 37-21139) that are to provide mitigation for Permit Application No. 37-22252 presently are appurtenant to the Old Cutters Subdivision in Hailey, Idaho.[2]

Protestant ICROA asserts that *Idaho Code § 67-6537* applies to the Old Cutters Subdivision and precludes the conveyance of the subject water rights from the Old Cutters Subdivision to Dry Lot. ICROA has raised the issue of retention of the subject water rights for the Old Cutters Subdivision with the City of Hailey in the context of Old Cutters' requested Annexation Agreement amendment. *Affidavit of Dana L. Hofstetter.* The Hailey City Council has tabled the matter pending a report and recommendation from the City Attorney. *Id.* At the present time, there is no certain date by which the Annexation Agreement amendment matter will be on the City Council meeting agenda for consideration. *Id.*

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[1] The description of the Applications are based on the original Applications filed as the anticipated Amended Applications have not yet been filed.

[2] Title to the subject water rights has not changed, as yet. Although Applicant Dry Lot LLC, has a contract to purchase portions of the subject water rights, Dry Lot's purchase is conditioned on the approval of Transfer No.

The current hearing and pre-hearing scheduling pursuant to the October 16, 2008 *Notice of Joint Hearing and Pre-Hearing Order* makes immediate preparation for hearing on the instant applications necessary although this entire proceeding would be mooted if *Idaho Code § 67-6537* is correctly applied. For this reason, ICROA respectfully requests that the Department vacate the pre-hearing and hearing schedule in this matter pending resolution of the applicability of *Idaho Code § 67-6537* to the Old Cutters Subdivision. Other ancillary reasons for vacating the hearing and pre-hearing schedule include the Applicant's failure to provide its amended applications by the deadline of November 10, 2008. (The amended applications have not yet been submitted as of this writing.) Preparations for hearing cannot properly begin until the actual applications have been made available. Also, the Brockway model report required to be provided by November 10, 2008 was provided in draft form on December 17, 2008.

Legal Discussion

As last amended in 2005, Idaho Code § 67-6537 requires "applicants proposing to make land use changes... to use surface water, where reasonably available, as the primary water source for irrigation." Under the statute, "reasonably available" includes situations where "a surface water right is ... appurtenant to the land."

The requirements of Idaho Code § 67-6537 squarely apply to the Old Cutters Subdivision and preclude transfer of the subject water rights from that property. The Old Cutters property was annexed to the City of Hailey in March 2006. *Affidavit of Dana L.*

74449.

Hofstetter. Immediately thereafter, in April 2006, the Old Cutters Subdivision application was submitted to the City of Hailey. *Id.* The Old Cutters Subdivision final plat was approved by the City in Summer 2007. *Id.* Thus, Idaho Code § 67-6537 was in effect at the time the Old Cutters Subdivision application was submitted and approved.

The Old Cutters Subdivision application submitted to the City of Hailey in April 2006 constituted a land use change proposal triggering Idaho Code § 67-6537. At that time and through to the present, the Old Cutters Subdivision property had appurtenant irrigation surface water rights (37-21130, 37-21137, and 37-21139). The express terms of Idaho Code § 67-6537 prevent the transfer of those appurtenant rights from the Old Cutters Subdivision. Any City or IDWR approval of the transfer of these rights from the property would violate this statute and would constitute *ultra vires* agency action, beyond the scope of statutory authority and, as such, would be void *ab initio*.

The instant applications hinge on transfer of the Old Cutters water rights from the Old Cutters Subdivision and, thereby, run afoul of Idaho Code § 67-6537. The current hearing schedule does not permit the requirements of this statute to be addressed and resolved before hearing preparations must begin in earnest. To avoid unnecessary hearing preparations, the hearing and pre-hearing schedule should be vacated.

Additional grounds for vacating the current schedule include the Applicant's delay in providing the Brockway Report and the absence of amended Applications at this late date. The hearing in this matter is scheduled to begin on February 10, 2009 with a discovery deadline of January 19, 2009. Although the October 16, 2008 *Notice of Joint*

Hearing and Pre-Hearing Order required that the Brockway model report and the amended applications be provided by November 10, 2008, the Brockway model report was only recently provided (and only in draft form) and the amended applications which were anticipated have not yet been provided. It is virtually impossible to undertake discovery and otherwise prepare for hearing without the actual applications which are the very subject matter of the proceeding.

Conclusion

For the foregoing reasons, Protestant respectfully requests that the pre-hearing and hearing schedule in this matter be vacated to allow the applicability of Idaho Code § 67-6537 to the Old Cutters Subdivision to be addressed prior to preparing for and holding a potentially unnecessary hearing. Further it is noted that the delay in amending the applications and providing the expert report also necessitate vacating the schedule.

RESPECTFULLY SUBMITTED this 19th day of December, 2008.

HOFSTETTER LAW OFFICE, LLC

By _____
Dana L. Hofstetter
Attorney for Protestant Indian Creek
Ranch Owners Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of December , 2008, I caused the foregoing be served by the pre-paid method(s) indicated on the following:

Original to:

David R. Tuthill, Jr., Director
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho 83702
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Copies to:

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Dana L. Hofstetter

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DEPARTMENT OF
WATER RESOURCES

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Attorney for Indian Creek Ranch
Owners Association, Inc.

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

In the Matter of Application for Permit No. 37-22252 and Transfer No. 74449 In the Name of Dry Lot LLC	))))))	**AFFIDAVIT OF DANA L. HOFSTETTER**

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

Dana L. Hofstetter, being first being duly sworn upon oath, deposes and says:

(1) I am Dana L. Hofstetter, counsel of record in this matter for Indian Creek Ranch Owners Association, Inc. ("ICROA").

(2) Attached hereto as Exhibit A is a true and correct copy of November 10, 2008 comments that I submitted on behalf of ICROA to the Hailey City Council regarding the Old Cutters Subdivision Annexation Agreement amendment matter that was on that evening's City Council agenda.

(3) Attached hereto as Exhibit B is a true and correct copy a November 12, 2008 *Idaho Mountain Express* article I printed from the Internet concerning the outcome of the Hailey City

Council's consideration of the Old Cutters Annexation Agreement amendment on November 10, 2008. The article indicates that the City is considering exchanging water rights for the developer's requested annexation fee relief and that the City Attorney was authorized by the City Council to discuss this with the developer's attorney.

(4) On December 18, 2008, I telephoned Beth Robrahn, the City of Hailey Planning Director, regarding the status of the Old Cutters Annexation Agreement amendment matter. She informed me that the City Council has indefinitely tabled the matter pending the City Attorney's report back to the City Council. Previously, in response to inquiries, Ms. Robrahn had informed ICROA that the Old Cutters property had been annexed to the City of Hailey in March 2006; the Old Cutters Subdivision preliminary plat application had been filed with the City in April 2006 and the Old Cutters Subdivision final plat had been approved by the City in Summer 2007.

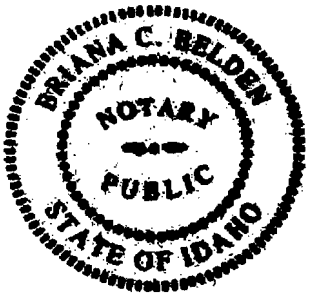
(5) While on November 14, 2008, I received a preliminary report authored by Brockway Engineering regarding the impact of Dry Lot's proposed applications, it was not until December 17, 2008 that I received the more extensive draft Brockway report entitled "Development of a Groundwater Flow Model for the Big Wood River Aquifer: East Fork to Bellevue." As of the date of this Affidavit, I have not received the Applicant's amended Applications in this matter which I understand are intended.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 19th day of December, 2008.

Dana L. Hofstetter

SUBSCRIBED AND SWORN to before me this 19th day of December 19, 2008.



Notary Public in and for the State of Idaho
Residing at: Meridian
My Commission Expires: 01-16-2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of December, 2008, I caused the foregoing **AFFIDAVIT OF DANA L. HOFSTETTER** to be served by the pre-paid method(s) indicated on the following:

Original to:

David R. Tuthill, Jr., Director
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho 83702
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Dana Hofstetter

Dana L. Hofstetter

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November 10, 2008

Via Facsimile (208) 788-2924

Hailey City Council
115 Main Street South, Suite H
Hailey, Idaho 83333

Re: Old Cutters' Request to Amend Annexation Agreement

Dear Hailey City Council Members:

On behalf of the Indian Creek Ranch Owners Association, Inc. ("ICROA"), I respectfully submit the following comments regarding the proposed Old Cutters' Request to Amend Annexation Agreement, Security Agreement and Dedication of Property scheduled for public hearing today. Thank you for considering the following comments and including them in the record.

It is noted that Paragraph 8 of the April 10, 2006, Annexation, Services and Development Agreement ("Annexation Agreement") between the City of Hailey and Old Cutters, Inc. states *inter alia* "[Old Cutters, Inc.] shall retain ownership of all the water rights which are currently appurtenant to the Property (the "Water Rights") and, except as hereinafter provided, in its sole and absolute discretion, may sell or otherwise convey and transfer the Water Rights off of the Property." It also is noted that Idaho Code § 67-6537 requires "All applicants proposing to make land use changes shall be required to use surface water, where reasonably available, as the primary water source for irrigation." This statute applies to the Old Cutters Subdivision and precludes transfer of the appurtenant Big Wood River irrigation water rights (Nos. 37-21130, 37-21137 and 37-21139) from the Old Cutters Subdivision property. **Any Annexation Agreement amendment should include appropriate revisions, especially to Paragraph 8, to conform its provisions to *Idaho Code § 67-6537*. At a minimum, the City Council should expressly confirm that by operation of Paragraph 23 of the Annexation Agreement any portion of Paragraph 8 inconsistent with *Idaho Code § 67-6537* is invalid and of no force or effect.**[1]

Sincerely,
HOFSTETTER LAW OFFICE, LLC

Dana Hofstetter

Dana L. Hofstetter

[1] For reference, Paragraph 23 of the Annexation Agreement provides: "23. **PARTIAL INVALIDITY.** In the event that any provision of this Agreement is deemed to be invalid by reason of the operation of any law, or by reason of the interpretation placed thereon by any court or other governmental body, this Agreement shall be construed as not containing such provision and the invalidity of such provision shall not affect the validity of any other provision hereof, and any and all other provisions hereof which otherwise are lawful and valid shall remain in full force and effect."

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Old Cutters development hits hard times

Hailey council frosty toward developer□s requests

by TONY EVANS

With economic calamity on his mind, Hailey developer John Campbell has asked city leaders for a hand.

Campbell, the developer of Old Cutters subdivision on Hailey's northeast border, is looking for re-negotiation of the terms he agreed to when the area was annexed into the city limits in November 2006.

But he didn't get far with the city council, which was generally cool to his appeal.

The Hailey City Council refused to accept a new financial arrangement with developer John Campbell on Monday night that would have released him from his first annual payment of $875,800 in annexation fees. The payment, due at the end of this month, was the first of four annual payments that were expected to bring the city a total of $3.87 million in annexation fees.

Campbell requested an alternate plan that included payments of $50,000 to the city for each lot that is sold in the subdivision.

"We are highly motivated to sell these lots," he said. "The money I owe the city is nothing compared to what I owe the bank."

"We are not working on commission," responded Councilman Don Keirn.

Campbell also wants to re-zone two parcels of land next to the subdivision. The original agreement called for those parcels to be given to the city as a tax-deductible donation.

"I want to know why these parcels have not been conveyed already," Keirn said.

Keirn and Council members Fritz Haemmerle and Carol Brown, the only members present, voted to deny the request, in a meeting that became tense.

They also expressed disappointment that the city has not received a developed lot within the subdivision, known as "Lot 73," that Campbell had agreed to give it after 55 percent of the lots in the subdivision had been sold.

Old Cutters was annexed into the city after three years of negotiations and includes 116 build-able sites. Out of the 149 single- and multi-family units slated for the project, the developer planned to build 25 affordable housing units, 12 of which would be set aside for affordable housing.

Campbell said that due to an extended downturn in the housing market and national economy, he has only been able to sell 13 of the lots. He also said it took three times longer than he expected to finalize the annexation agreement with the city.

EXHIBIT B

Story continues below

"I had 60 lots reserved with deposits," he said. "By the time we were entitled, people just walked from them."

Under the annexation agreement, annual payments of $875,800 were to be paid to the city each year beginning from the date of final plat approval, or when 35 percent, 55 percent and 85 percent of the parcels were sold, whichever came first.

Campbell's attorney, Jim Speck, said Monday night that his client had only $169,000 in an escrow account from lot sales.

"In this market we do not have the ability to pay the annexation fee," he said, adding that under the current agreement, Lot 73, which he estimated was worth $200,000, would not be transferred to the city. He requested a transfer of Lot 73 after 60 of the units are sold or in November 2010.

"Developing is a high-risk, high-reward business," Haemmerle said. "Under your proposal you shift all of that risk to the city. I agree that this is a bad economy, but I believe developers should be capitalized in case of bad economies."

"The city shares some of your pain, "City Administrator Heather Dawson said. "But our tax levies are applied to the price of land. Without the cash flows we expected into our capital improvement plan from this development, we are missing opportunities as well."

City Attorney Ned Williamson mentioned the planned sale of water rights from Old Cutters to the Valley Club golf resort as a possible means of negotiating with Campbell.

'This could possibly be a water, rather than cash, consideration," he said.

Williamson was instructed by the council to meet with Speck to see if an agreement can be reached between Campbell and the city by the next city council meeting on Nov 24.

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